BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rules Allowing State Universal Service Funds to Assess Charges on Nomadic Voice Over Internet Protocol Intrastate Revenues	)	WC Docket No. 06-122

COMMENTS OF THE
NEW YORK STATE PUBLIC SERVICE COMMISSION

The following comments are submitted on behalf of the New York State Public Service Commission (NYPSC) pursuant to a Public Notice (Notice) released August 10, 2009 by the Federal Communications Commission (FCC). The Notice requests comments on the Nebraska Public Service Commission's and Kansas Corporation Commission's (Petitioners) request for declaratory ruling or, in the alternative, adoption of a rule that allows states to assess nomadic voice over Internet protocol (VoIP) intrastate revenues. Petitioners request that the FCC rule states are not preempted from assessing universal service fund (USF) contributions on the intrastate portion of the revenues generated by nomadic interconnected VoIP providers.[1] Petitioners

[1] The petition and Notice concern nomadic VoIP service only, which allows a customer to place and receive calls anywhere a broadband Internet connection exists. Fixed VoIP providers generally run landline facilities directly to a fixed customer's premises and are not subject to the FCC's Notice.

also request that the FCC find that states have discretion to adopt any funding mechanism, provided nomadic VoIP providers are not (1) assessed on the interstate portion of their revenues or (2) required to pay assessments to more than one state on the same intrastate portion of their revenues.

The NYPSC recently initiated a proceeding that, in part, will consider modifications to the existing state regime to "address issues related to the sources of financial support for the state's incumbent wireline telephone companies, and how best to maintain or modify existing support mechanisms for socially-beneficial telephone services, such as Lifeline and 911."[2] That proceeding, in part, will examine whether competitive neutrality and universal service are promoted by an intrastate USF assessment on nomadic VoIP providers terminating traffic in New York. Accordingly, the NYPSC supports the adoption of a FCC ruling that acknowledges a state's right to assess USF contributions on nomadic VoIP providers' intrastate revenues, provided there is no conflict between the federal assessment of USF contributions and the states' assessment on the remaining intrastate portion.

In 2006, the FCC adopted its USF Contribution Order[3] requiring interconnected VoIP providers to contribute to the federal USF, based in part on the benefit received by interconnected VoIP providers from universal service when they place and receive calls over the Public Switched Telephone Network (PSTN). The FCC noted that like other contributors to

[2] Case 09-M-0527, Proceeding to Examine Issues Related to a Universal Service Fund, Notice Establishing Universal Service Proceeding (issued August 3, 2009).

[3] Report and Order and Notice of Proposed Rulemaking, Universal Service Methodology, 21 FCC Rcd 7518, 7536 (2006)(USF Contribution Order), affd. in part and rev'd. in part, Vonage Holding Corp. v. FCC, 489 F3d 1232 (D.C. Cir. 2007).

the fund, interconnected VoIP providers depend on the PSTN for the maintenance and expansion of their business. Moreover, the FCC found that requiring interconnected VoIP providers to contribute to the federal USF would promote "competitive neutrality" by mitigating the possibility that carriers with USF obligations will compete directly with providers without USF obligations.[4] The FCC required interconnected VoIP providers to contribute based on interstate revenues using one of three options: (1) a safe-harbor under which 64.9% of revenues are deemed interstate, (2) a traffic study estimating the interstate usage percentage, or (3) an actual interstate percentage based on actual revenue allocations.[5] Defining the interstate figure created a correlative intrastate contribution factor.

In an *Amicus Curiae* brief filed with the Eighth Circuit Court of Appeals in the Vonage v. Nebraska Public Service Commission,[6] the FCC posited that states are not preempted from assessing universal service charges on the intrastate portion of the revenues generated by nomadic VoIP providers because Nebraska's state USF contribution requirement did not frustrate the FCC's federal policy objectives.[7] The Eighth Circuit stated that before states may assess universal service contributions on the intrastate portion of nomadic VoIP

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[4] USF Contribution Order, ¶¶ 43-44.

[5] Id., ¶¶ 53, 57.

[6] Vonage Holdings Corp. v. Nebraska Pub. Serv. Commission, 564 F.3d 900 (8th Cir. May 1, 2009).

[7] Commission's *Amicus Curiae* brief, pp. 16-17.

revenues the FCC must first issue a formal order allowing them to do so.[8]

In New York, universal service goals have largely been accomplished through a combination of state and federal programs. States provide matching support for the federal USF's Lifeline telephone program. The Targeted Accessibility Fund (TAF) is the mechanism established in New York to support and equitably distribute, on a competitively-neutral basis, our share of the costs associated with Lifeline, and other socially-beneficial programs, including Telephone Relay Service (TRS) for the hearing impaired.

TAF was established prior to the growth of intermodal competition. Since the inception of TAF, interconnected VoIP and wireless providers have emerged as the sole source of voice communications for many New Yorkers. Traditional access lines are being replaced by these alternatives. For example, Verizon New York Inc. (Verizon) reports that it has lost over 10% of its traditional access lines in 2008, and as of June 2009 has approximately 5.9 million access lines, representing about half the number of lines at its peak in 2000.[9] Nearly all of the state's incumbent telephone companies have non-affiliated cable companies in their territories offering voice service, and they too have experienced substantial access line losses as a result.[10] These developments have resulted in decreased access

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[8] Vonage Holding Corp. v. Nebraska Pub. Serv. Commission, 564 F3d 900, 905 (8^{th} Cir. May 1, 2009).

[9] *See generally*, Case 09-C-0361, In the Matter of Quality of Service provided by Local Exchange Carriers in New York State (filed Session of August 20, 2009).

[10] *See e.g.*, Case 05-C-0616, Intermodal Competition, Statement of Policy on Further Steps Toward Competition in the Intermodal

lines and more revenue losses for the telecommunications carriers that are required to participate in TAF.[11] In its Competition III Order, the NYPSC stated that (1) TAF's funding assessment should be applied to all providers, (2) both the collection and disbursement of TAF funds should be competitively neutral, and (3) TAF should be funded equitably across all service types and available to all providers. Programs funded by TAF support fundamental public needs and benefit all telecommunication providers in New York, not just those that pay into it.

While the NYPSC has been able to assure universally available service in the past, additional sources of revenue may be required to maintain universal service going forward. The TAF is currently supported by a limited number of providers, but as competition increases, those providers face insufficient revenues to fund ongoing operating costs. This unbalanced approach is not consistent with the FCC's universal service principles (47 U.S.C. §254(b)) and the federal requirement that state efforts to preserve and advance universal service be done in an equitable and non-discriminatory manner (47 U.S.C. §254(f)). New York's experience is not unique which is why it is critical for the FCC to declare that state commission efforts to implement an appropriate intrastate funding mechanism supported by revenues from all carriers conducting business within its borders, including nomadic interconnected VoIP

Telecommunications Market and Order Allowing Rate Filings (issued April 11, 2006)(Competition III Order).

[11] Regulated telecommunications carriers doing business in New York with more than $25,000 of annual accessible revenues are required to participate in the funding mechanism.

providers, does not frustrate federal rule or policy but are fully consistent with serving the public interest.

The NYPSC is fully committed to universal, affordable, and reliable telecommunications services for all customers. As the FCC noted, there is no real conflict between the federal assessment on interstate USF contributions and the state assessment on the remaining intrastate portion and, therefore, joins in the Petitioners' request for a ruling that nomadic VoIP providers may be subject to an assessment of their intrastate revenues to support universal service.

Respectfully submitted,

Peter McGowan
General Counsel
New York State Public
Service Commission
Three Empire State Plaza
Albany, NY 12223-1350

Dated: September 9, 2009